

**People v. Clark, 2016 IL 118845**

Appellate citation: 2014 IL App (1st) 123494

JUSTICE KARMEIER delivered the judgment of the court, with opinion.

Chief Justice Garman and Justices Freeman, Thomas, Kilbride, Burke, and Theis concurred in the judgment and opinion.

In 2011, a Chicago man who was parking his vehicle in his garage was accosted by two individuals who took it from him. One of them was alleged to be this defendant, who was identified by the victim in a lineup and in open court. The victim testified that Fred Clark held a 9-millimeter Ruger handgun to his head and also struck him on the head with it. The gun was found in the stolen vehicle when it was recovered, and a photograph of it was identified by the victim. The defendant was charged with two firearm offenses: aggravated vehicular hijacking while armed with a firearm and armed robbery while armed with a firearm. These were Class X felonies carrying a potential sentence of 21 to 45 years.

At the defendant's Cook County bench trial, he testified in his own defense, claiming innocence and acknowledging that, at the time of trial, he was in custody for a juvenile parole violation concerning a controlled substance. The circuit court judge announced his determination that the gun was used as a bludgeon and would be treated as such. Although the evidence supported conviction for the offenses as charged, the defendant was found guilty of two uncharged offenses which did not involve firearms and which called for lower sentencing ranges: aggravated vehicular hijacking and also armed robbery without a firearm. The statutory provisions on which these two new offenses were based explicitly excluded the possession or use of a firearm. Concurrent terms of 17 and 7 years were imposed. The judge shed some light on his thought process when he said that he "gave some deference and benefit of the doubt and justice" in light of Clark's age and the fact that the gun was not fired. What had occurred here was in fact an acquittal of the charged offenses, and both the appellate and supreme court viewed this as intentional on the part of the trial judge.

The appellate court reduced the convictions to the nonfirearm offenses of vehicular hijacking and robbery, with a remand for resentencing. In this decision, the supreme court said that this was proper. Although there may be no conviction for an offense which has not been charged, nevertheless a defendant may be convicted of an uncharged offense which is supported by the trial evidence if it is a lesser-included offense of a crime expressly charged. The firearm offenses originally charged and the nonfirearm offenses for which he was convicted are mutually exclusive of each other, so that the latter are not lesser-included offenses of the former. This defect was not timely asserted so as to preserve it for review, but it amounts to plain error which may be considered on appeal where, as here, the unauthorized convictions are clear or obvious error which challenges the integrity of the judicial process.

The supreme court noted that the remedial application of the plain error doctrine is discretionary. It said that to allow these convictions to stand would seem to suggest condoning a kind of mix-and-match, *ad hoc* justice in which specific convictions of record do not matter

The appellate court was affirmed.